

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED

JAN 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	MM Docket No. 95-31
Reexamination of the Comparative)	
Standards for Noncommercial)	
Educational Applicants)	

To: The Commission

COMMENTS

Pinebrook Foundation, Inc. ("Pinebrook"), by its attorneys, hereby responds to the Federal Communication Commission's *Further Notice of Proposed Rulemaking*, released October 21, 1998, in the captioned proceeding ("*Further Notice*"). The *Further Notice* extends the FCC's effort to improve the procedures for choosing among competing applicants for non-commercial educational ("NCE") broadcast stations.

Pinebrook urges that the FCC modify the existing NCE selection procedures with three critical considerations in mind: First, that the revised procedures be fundamentally fair in light of the operational characteristics unique to NCE licensees; second, that the procedures include a mechanism for ferreting out applicants who have not filed in good faith; and, third, that the FCC take advantage of lessons learned from recent reassessments of its traditional comparative formulae.

In the framework of these parameters, the proper resolution of this proceeding should include some version of a comparative evaluation that would permit more than a superficial assessment of the relative merits of a set of competing applicants. The primary factor

No. of Copies rec'd
List ABCDE

0+4

considered in traditional NCE hearings is “the extent to which each of the proposed operations will be integrated into the overall educational operations and objectives of the respective applicants.” *See New York University*, 10 RR 2d 215, 217-18 (1967). In theory, this standard has surface appeal, but in practice, it is too abstract to implement in a consistent and meaningful way. However, Pinebrook agrees with those commentators -- the majority thus far in this proceeding -- who favor retaining some form of comparative hearing. Notwithstanding the shortcomings of this approach, it is fair to all applicants and it affords adequate discretion to Commission decision makers.

In the *Further Notice*, the FCC “tentatively conclude[s]” that it should “not continue to use traditional hearings.” Hearings, reasons the Commission, “can be cumbersome, costly, and delay service to the public without substantial offsetting public interest benefits in terms of selecting the ‘better’ applicant because the selection often turns on minimal distinctions.” *Further Notice* at ¶9. However, this concern can be resolved without abandoning the comparative hearing approach altogether.

The very fact that a wide variety of entities may be eligible to apply for NCE channels -- including schools, churches, educational arms of state and local governments, and not-for-profit organizations -- accentuates the need for a system with a high probability to expose sham applicants. The FCC’s procedures should ensure that the successful applicants for contested non-commercial frequencies can be trusted not to prey upon the good will of listeners, such as those with religious or educational interests, who sustain the viability of

NCE stations. For this reason, it is imperative that the FCC not allow its prudential concerns with administrative efficiency to imperil the integrity of the licensing process in the NCE context.

Pinebrook does not dispute that the Court of Appeals, in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) identified certain weaknesses in the integration criterion used in hearings over commercial channels. However, as it has been implemented historically by the FCC, the hearing process has shown itself capable of detecting bad faith applicants in the “crucible” created when applicants must defend their proposals in live testimony before an Administrative Law Judge. The FCC should, therefore, refrain from abandoning a procedural structure that has served the agency well in terms of the most important goal of NCE broadcast licensing.

A modified approach would strike the necessary balance, as long as the criteria for assessing competing applicants are adequately precise and verifiable. Criteria which would satisfy that requirement would include meritorious broadcast record; local ties to the community or service area; and certain technical considerations.

In terms of basic qualifications, the FCC should continue to verify that NCE applicants possess the financial ability to construct and operate the station. The incentive to complete construction promptly that is inherent in the auction process for commercial stations does not apply in the setting of NCE applications.

In addition, Pinebrook is unaware of any reason that the statutory objectives embodied in §307(b) of the Communications Act -- requiring a fair, efficient, and equitable distribution of service among communities -- should not apply with full force in this context. Therefore, a preference on the basis of §307(b) should be applied.

The value of meritorious past broadcast record as a comparative criterion was discussed in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 398, 5 RR 2d 1901, 1912-13 (1965). Nothing that has happened since then has detracted from the relevance of past performance in selecting the best applicant for a new channel. For the FCC to award a preference to applicants who have gone the extra mile in providing unusually good service to their audiences would encourage numerous licensees to serve their communities better. Moreover, the FCC would be secure in the knowledge that those whom it is entrusting with new NCE FM spectrum will exercise responsibility in the development of such new stations. Thus, any new comparative system for NCE applicants should include a preference for meritorious past broadcast record.

In light of the logic underlying the criterion of past broadcast record, a preference for an applicant who is an AM daytime licensee in the same area should also be included. The FCC has historically considered preferential treatment for daytime-only licensees to be in the public interest when such licensees are applying for FM allotments in their communities of license. *Second Report and Order, FM Broadcast Assignments*, 101 FCC 2d 638, ¶16 (1985), *recon. denied*, 59 RR 2d 1221 (1986), *further recon. denied* 2 FCC Rcd 481 (1987),

aff'd sub nom. National Black Media Coalition v. FCC, 822 F.2d 277 (2nd Cir. 1988). Such treatment has been predicated upon the unique nature of daytimers as a class of broadcast licensee. *Id.* at ¶13.

In particular, financial disadvantages often attach to daytimer status, and the Commission has found a daytimer preference in comparative hearings to be responsive to such difficulties. *Id.*; *see, also, Reexamination of the Policy Statement on Comparative Broadcast Hearings*, 7 FCC Rcd 2664, ¶27 (1992). The Commission has viewed the ability of daytimer licensees to broadcast in the face of such hardship as strong evidence of their ability to operate an FM station in the same community of license. *Second Report & Order* at ¶13. In fact, the courts have upheld the FCC's determination that the daytimer preference acts in the public interest to counteract the disadvantage such stations would have in overcoming the Commission's diversification preference. *National Black Media Coalition* at 279.

For over 25 years, Pinebrook Foundation has operated AM radio station WPEO, Peoria, Illinois. This station operates only during the daytime because of the need to protect the clear channel station on the same frequency. Thus, the Foundation's ability to serve the public through broadcasts over WPEO has been compromised by the requirement that it terminate operations at sundown.

This limitation is particularly onerous in the winter months, when the station is prohibited from broadcasting not only in the evenings, but even substantial portions of morning and afternoon drive time, when radio listening peaks.

Consistent with the considerations discussed above, the daytimer preference for NCE applicants should apply to applicants which (a) are nonprofit, educational organizations, (b) have proven their ability to serve the public through the operation of a broadcast station, but (c) have been handicapped by the limitations inherent in a daytime AM facility.

For this reason, Pinebrook urges that the FCC not adopt an approach which includes “local diversity,” *Further Notice* at ¶21, as a basic criterion. If the purpose of the FCC’s licensing process in the NCE arena is to select the best qualified applicant, it is difficult to see why “local diversity” carries any predictive value.

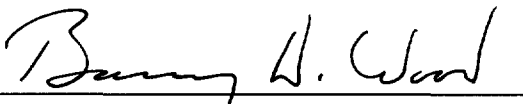
On a similar point, the FCC should not attempt to import a “minority control credit,” *Further Notice* at ¶24, into any new NCE licensing scheme. In light of *Adarand v. Peña*, 515 US 200 (1995), Pinebrook cannot envisage the use of a “minority control credit” which would not run afoul of the Constitution.

As indicated earlier, a modified comparative hearing procedure structured along these parameters is the best approach. However, if the FCC should conclude that a “point systems” approach is preferable, it should likewise follow the lines discussed above. In addition, in order to preserve the integrity of the licensing process, a point system would have to include a mechanism to screen out applicants who have not filed in good faith. Because a point system is, in effect, a type of simplified hearing, some means for identifying unscrupulous applicants must be inherent in such a procedure if it is to have any salutary force.

The most important grounds supporting a comparative hearing process or, to a lesser extent, a point system illustrate the reasons that a lottery scheme would be ill advised. Fundamentally, there simply is no empirical connection between a method of random selection based on chance and the high quality of public service that audiences and consumers have the right to expect of NCE licensees. The Commission, in turn, has a right to expect that stewards of scarce NCE spectrum will be motivated by higher objectives than a lottery windfall.

Respectfully submitted,

PINEBROOK FOUNDATION, INC.

By: 
Barry D. Wood
Ronald D. Maines

WOOD, MAINES & BROWN,
CHARTERED
1827 Jefferson Place, NW
Washington, D.C. 20036
(202) 293-5333

Its attorneys

Dated: January 28, 1999